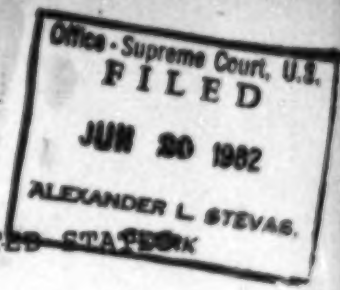
82-129



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

MARVIN DALTON,	)
	)
Petitioner,	)
	)
-vs-	)
	)
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA and and NORTH CAROLINA STATE PERSONNEL COMMISSION,	)
	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kenneth N. Flaxman
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
(312) 236-8558

Attorney for Petitioner

Julius LeVonne Chambers
Chambers, Ferguson, Watt, Wallas
Adkins & Fuller, P.A.
951 South Independence Boulevard
Charlotte, North Carolina 28202

(Of Counsel)

QUESTIONS PRESENTED

1. When an employer has used the same biased testing procedure to evaluate both applicants for employment and incumbent employees seeking promotions, does a class action on behalf of every applicant or employee who might have been prejudiced by the test satisfy the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure?

2. Where the discriminatory impact of the testing procedure upon applicants for employment and incumbent employees has been raised in an EEOC charge filed by an incumbent employee, and where the employer does not raise any affirmative defense involving the scope of the EEOC charge, may an unsuccessful applicant for employment who has not filed an EEOC charge join as co-plaintiff in a timely filed action under Title VII of the Civil Rights Act of 1964 as amended?

3. When the defendants and a plaintiff class have entered into a consent decree which does not purport to adjudicate the interests of persons not within the class, are persons claiming to have

been wrongfully excluded from membership in the plaintiff class precluded from seeking review of the district court's unfavorable class determination?

4. When a claim brought under 42 U.S.C. §1981 for racial discrimination in hiring has been erroneously dismissed because of the plaintiff's failure to have obtained a "right to sue" letter from the EEOC, may the error be deemed harmless because the employer has agreed not to discriminate in the future, without having agreed to any remedy for past discrimination in hiring?

TABLE OF CONTENTS

Questions Presented.....1

Opinions Below.....3

Jurisdiction.....3

Rules Involved.....3

Statement.....4

Reasons for Granting the Petition.....10

Conclusion.....16

TABLE OF AUTHORITIES

Albermarle Paper Co. v. Moody.....10
405 U.S. 422

Board of School Commissioners.....16
v. Jacobs, 420 U.S. 128

DeMarco v. United States.....13
415 U.S. 449

Fitzpatrick v. Bitzer.....6
427 U.S. 445

Franks v. Bowman Transportation.....6
Co., Inc., 424 U.S. 747

General Telephone Co.....10-12
of Southwest v. Falcon,
No. 81-574 (June 14. 1982)

Louisiana v. United States.....13
380 U.S. 145

Taylor v. Jones.....15
653 F.2d 1193

United Air Lines v. McDonald.....10, 16
432 U.S. 385

Zipes v. TWA.....10, 13
No. 78-1545 (February 24. 1982)

42 U.S.C. §1981.....passim

Title VII of the Civil Rights.....passim
Act of 1964, as amended,
42 U.S.C. 2000e et seq.

Federal Rules of Civil Procedure

Rule 23(a) 11
Rule 23(c)(3) 14

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1A-11A) is reported at 671 F.2d 835. The opinions and orders of the district court (Appendix C, infra, 13A-19A, Appendix D, infra 20A-22A, Appendix E, infra, 23A) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1): The judgment of the court of appeals was entered on February 25, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was denied on April 21, 1982. (App, B, infra, 12A.)

RULES INVOLVED

1. Rule 23(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) One or more members of a class may sue or be sued as representative parties on behalf of all only if * * (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class * *
>
> * * *

2. Rule 23(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> (c) * * *
>
> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. * * *

3. 42 U.S.C. §2000e-5(b) provides in pertinent part:

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice . . . the Commission shall . . . make an investigation thereof * * *

STATEMENT

Prior to 1975, applicants for employment with the North Carolina Employment Security Commission ("ESC") were hired on the basis of scores on a written test. The passing rate for white applicants (89.4%) was more than twice the pass rate (41.7%) for blacks. For those hired, the

score on the entry examination would be used for a two year period as the primary factor in promotional decisions.

In 1973, Walter Bailey, then an employee of the ESC, filed a charge with the Equal Employment Opportunity Commission complaining of racial discrimination by the ESC. As subsequently amended (App. 23A), Bailey's charge alleged that

> The above employer discriminates against Negroes and Females with respect to hiring, promotions, and job classifications on the basis of race and sex.
>
> The above employer discriminates against Negroes through the use of discriminatory tests.

In 1975, petitioner Marvin Dalton joined with Bailey and two others as plaintiffs to complain of racial discrimination by the ESC. Claims were presented under Title VII and under 42 U.S.C. §1981. Petitioner's individual claim involved alleged discrimination in hiring arising from the impact upon black applicants of the entry examination.

On April 28, 1978,[1] the district court allowed the case to proceed as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure on behalf of

> All black persons who have been employed or denied employment since May 17, 1973, who are now employed, or who may in the future be employed by the Employment Security Commission of North Carolina. (App. 17A.)

In the order allowing the case to proceed as a class action, the district court dismissed petitioner as a named plaintiff because of his "failure to meet the jurisdictional prerequisites necessary to bring an action under Title VII," i.e., to have filed a charge with the EEOC and obtained a "right to sue" letter. (App. 18A.) The district court

---

[1] The district court initially stayed proceedings pending resolution of the Eleventh Amendment issues decided in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). (App. 14A.)

Thereafter, adjudication of the merits was postponed while the district court considered defendants' motion to dismiss for failure to join the United States Secretary of Labor as a defendant. (App. 15A.)

recognized that petitioner could obtain relief as an unnamed member of the plaintiff class. (App. 18A.)

On February 27, 1980, the district court eliminated petitioner from further participation in as a unnamed member of the class when it redefined the class to exclude unsuccessful applicants for employment. (App. 20A-21A.)

Bailey and the class he represented were able to settle with defendants the issues remaining in the case.[2] (App. 5A-6A.)

After entry of the final decision, petitioner prosecuted an appeal to seek review of the order dismissing him as a

---

[2] Resolution of the class claims included an award of back pay to all class members aggrieved by defendants' promotional testing policy, as well as prospective injunctive relief prohibiting the future use of unvalidated tests. In addition, defendants agreed to meet goals for promotion of black employees for a four year period following entry of the decree, as well as agreeing not to discriminate in the future "in hiring, promotion, upgrading, training, assignment or discharge."

The personal claims of the named plaintiff arising from his alleged wrongful discharge were resolved in separate settlement. (App. 6A.)

named plaintiff and the subsequent order refusing to allow plaintiff Bailey to represent unsuccessful applicants for employment. (App. 7A.)

In a decision filed on February 25, 1982, a panel of the court of appeals concluded that the district court had correctly dismissed petitioner as a co-plaintiff. In the view of the court of appeals, the district court did not have jurisdiction to hear and decide claim of discrimination in hiring because petitioner's claim was "not 'substantially identical' with that of Bailey, the only plaintiff with standing to maintain a Title VII action." (App. 8A.)

The panel then turned to petitioner's argument that he should have been included as an unnamed class member because "[u]nsuccessful applicants for employment and employees denied promotion are properly members of the same class when the unlawful employment practice at issue is a single test which has a disparate impact." (Brief of Appellant, Ct. of App., at 16.) The court of appeals rejected this claim:

> The conclusion that his dismissal as plaintiff was proper also disposes of Dalton's second claim on appeal (so far as a Title VII action is concerned) that he was improperly denied the right to represent applicants for employment as a class representative. (App. 9A.)

The panel agreed that petitioner's claim under 42 U.S.C. §1981 should not have been dismissed because of his failure to have filed a charge with the EEOC (App. 9A) but held that the portion of the consent decree which prohibited defendant from discriminating in the future "provides as much relief as Dalton could have secured had he continued as a plaintiff." (App. 9A-10A.)

Finally, the panel suggested that the consent judgment between defendant and the class represented by Bailey precluded any appeal by a person, like Dalton, who had been dismissed as a co-plaintiff and then excluded from the plaintiff class by adverse rulings of the district court. (App. 10A.)

REASONS FOR GRANTING THE PETITION

The issues presented by this case are of substantial significance to class action litigation and to the proper administration of Title VII of the Civil Rights Act of 1964 as amended. Certiorari is especially warranted because the decision of the court of appeals appears to be contrary to this Court's recent decisions in General Telephone Co. of Southwest v. Falcon, No. 81-574, (June 14, 1982) and Zipes v. Trans World Airlines, Inc., No. 78-1545 (February 24, 1982).

1. This Court has repeatedly reaffirmed that full relief under Title VII may be awarded to persons who have not filed their own charges with the EEOC. Albermarle Paper Co. v. Moody, 405 U.S. 422, 414 n.8 (1975); Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 771 (1976); United Air Lines v. McDonald, 432 U.S. 385, 389 n.6 (1977).

Prior to the Court's recent decision in General Telephone Co. of Southwest v. Falcon, No. 81-574 (June 14, 1982), the lower federal courts were divided as to whether and under what circumstances relief under Title VII could be awarded to unsuccessful applicants for employment

in a class action prosecuted by an incumbent employee.

In its decision in this case, the court of appeals held in a case prosecuted by a former employee complaining about the biased testing procedure used to evaluate incumbents who had applied for promotional vacancies, a district court lacks jurisdiction to grant relief under Title VII[3] to persons who were not hired because of the same biased testing procedure. (App. 8A.)

The decision of the court of appeals is flatly at odds with Falcon, where the Court held that if an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." (Id. at 10 n.15.)

---

[3] The court of appeals agreed that relief could have been awarded to petitioner under 42 U.S.C. §1981, but held that such relief could not include a remedy for past discrimination in hiring. See infra at 12.

Under Falcon, petitioner and other black persons who were not hired because of the entrance examination should have been included within the plaintiff class with incumbent employees who were not promoted because of low passing scores on the examination.

2. As an alternative ground for its decision, the court of appeals held that because an unsuccessful applicant had not filed a charge with the EEOC, the district court lacked jurisdiction to grant relief to persons aggrieved by the impact of the biased test in hiring decisions. (App. 7A-9A.)

This jurisdictional theory is inconsistent with this Court's decision in Falcon, where the the Court accepted without discussion the Fifth Circuit's rejection of the employer's claim that a district court lacks "jurisdiction over the claim of hiring discrimination because the EEOC charge referred only to discrimination with respect to promotion" was accepted without discussion. 626 F.2d at 376-77 (5th Cir. 1980).

The jurisdictional argument rejected in Falcon is even less substantial in this case, where the named plaintiff had

amended his initial EEOC charge to complain of discrimination "through the use of discriminatory tests" in hiring and promotions.[4] (App. 24A.)

Moreover, any conclusion that the charge filing requirement of Title VII is a jurisdictional prerequisite is contrary to this Court's decision in Zipes v. Trans World Airlines, Inc., No. 78-1545, (February 24, 1982.

In Zipes, the Court made plain that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the District Court. . . [but is to be construed as] a requirement subject to waiver as well as tolling when equity so requires." (slip op. 11-12.) Any defects in the scope of EEOC charges have been

---

[4] As we pointed out in our petition for rehearing (at 6), the court of appeals misapprehended the record when it stated (App. 5A n.3) that discrimination in hiring had not been raised before the EEOC. This erroneous finding by the court of appeals, made sua sponte by the court below, underscores the importance of the rule that "factfinding is the basic responsibility of district courts, rather than appellate courts." DeMarco v. United States, 415 U.S. 449, 450 n.* (1974).

waived in this case. Here, defendants have never sought to defend the denial of relief to petitioner and persons similarly situated because of any shortcoming in the the charges filed with the EEOC.[5]

Finally, a holding that EEOC charges can only be filed by a person actually aggrieved by a challenged employment practice, i.e., by a person who has "standing" (App. 8A) is contrary to the language of 42 U.S.C. §2000e-5 which directs the Commission to act in response to "a charge filed by or on behalf of a person claiming to be aggrieved." (emphasis supplied).

3. Although the court of appeals agreed that petitioner should have been permitted to appear as a co-plaintiff to

---

[5] The scope of Bailey's EEOC charge was not at issue until after the decision of the court of appeals in this case.

The EEOC charges referred to by the court of appeals (App. 5A n.3) were filed by defendant State Personnel Commission as exhibits to its motion for summary judgment. In that motion, the Personnel Commission claimed that, unlike the ESC, it had not been named in the EEOC charges. The District Court deemed the motion for summary judgment untimely, and expressly relieved plaintiff of any obligation to respond. (App. 21A.)

assert his claim under 42 U.S.C. §1981, the court below held that the consent decree "provides as much relief as [petitioner] could have secured had he continued as a plaintiff in the §1981 action."(App. 10A). In addition, the court of appeals suggested that entry of the decree "precludes" petitioner's appeal. (Id.) Each of these rulings is flatly at odds with prior decisions of this Court.

First, the decree fails to provide any remedy for past discrimination. Had he prevailed in his Section 1981 claim, petitioner would have been plainly entitled to entry of "a decree which so far as possible eliminate[s] the discriminatory effects of the past." Louisiana v. United States, 380 U.S. 145, 154 (1964). Such a decree may of course include "affirmative equitable relief" Taylor v. Jones, 653 F.2d 1193, 1204 (8th Cir. 1981), for past discrimination in hiring.

Second, Rule 23(c)(3) makes plain that a judgment in a case brought as a class action is only binding upon those who are "include[d] and describe[d]" in the judgment. Thus, petitioner and other

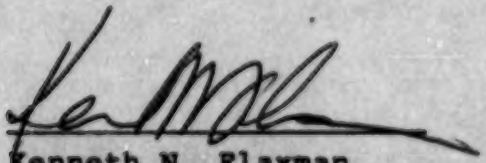
persons similarly situated who are not included within the class defined in the consent decree are not bound by the terms of the decree. Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975).

As in United Air Lines, Inc. v. McDonald, 432 U.S. 432 U.S. 385 (1977), petitioner had standing to seek review of the adverse class decision. Certiorari should be granted to correct the contrary conclusion by the court of appeals.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



Kenneth N. Flaxman
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
(312) 236-8558

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARVIN DALTON,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 81-1242
-vs-	)	
	)	
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA and and NORTH CAROLINA STATE PERSONNEL COMMISSION,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Robert R. Merhige, Jr., District Judge.[*]

Argued: November 3, 1981.
Decided: February 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, and RUSSELL and HALL, Circuit Judges.

---

* United States District Judge for the Eastern District of Virginia, sitting by designation.

RUSSELL, CIRCUIT JUDGE:

The plaintiff/appellant Marvin Dalton, along with three other plaintiffs, suing individually and as representatives of a proposed class, filed in May, 1975, a discrimination action under title VII, 42 U.S.C. §200e, et seq., and §1981, 42 U.S.C., against the defendant Employment Security Commission of North Carolina, and certain individual defendants.[1] Early in the proceedings the individual defendants were, however, dismissed as parties, by consent.

The action seems to have proceeded haltingly with the plaintiffs seeking class certification only in 1979, about three years after the action was filed. In response to what the defendants urged was plaintiffs' belated request for class certification, the defendants moved for summary judgment for failure of the plaintiffs to prosecute their action diligently. The district judge refused to grant summary judgment at this stage

---

[1] On motion of the Employment Security Commission, the State Personnel Commission of North Carolina was added as a defendant.

of the proceedings for failure to prosecute diligently. He construed, though, the §1981 action against the defendants who remained, (i.e., the two State Departments) as in effect one against the State and held that, under the Eleventh Amendment, the plaintiffs could not recover against those Departments a money judgment but were restricted in remedy to injunctive relief. That ruling is not challenged in this appeal. In the same order the district judge did dismiss three of the plaintiffs, including the plaintiff Dalton, as plaintiffs because of their failure to file a charge with, or to obtain a right-to-sue letter from, the Equal Employment Opportunity Commission before suit. In each instance, however, he authorized the participation of the dismissed plaintiffs as members of the class simultaneously certified with Bailey as class representative, if they

qualified as a member of such class.[2] At the same time a class certification, stated to be tentative and conditional, was approved with Bailey as class representative. This tentative class certification, entered on May 7, 1980, was later amended to define the certified class as:

> "All black persons employed by the Employment Security Commission of North Carolina on or after May 17, 1973 who were denied promotions, or who were

---

[2] Of the four plaintiffs only the plaintiff Bailey had filed charges of discrimination with the EEOC and obtained a right-to-sue letter prior to suit. The plaintiff McLean had filed charges but she had not received a right-to-sue letter. Neither the plaintiff Hubbard nor the plaintiff-appellant Dalton had filed charges of discrimination with the EEOC or obtained a right-to-sue letter.

The claim of discrimination by Bailey was discriminatory treatment as an employee; that by McLean discriminatory denial of promotion, and that by Dalton and Hubbard discriminatory failure to hire after successfully passing the test for applicants. There is, however, in the record an affidavit from the official in charge of the records of the defendant that there is no record that Dalton either ever applied for employment or had taken the test for applicants. This discrepancy between the defendants' records and the plaintiff Dalton's claims was not resolved.

> deterred from applying for promotions, because of the promotional testing program used by the Employment Security Commission prior to November, 1975. [3]

On the eve of trial, some five or six years after the action had been begun, the parties agreed on a "Consent Decree" which expressly stipulated that it was a "final adjudication of all issues raised in this action, excepting that of Walter Bailey." This decree was consented to by counsel for the defendants and by the

---

[3] This certification was, oddly enough, different from the actual charges filed by Bailey with the EEOC. Bailey had filed three complaints with the EEOC; the first on November 9, 1973, the second on February 17, 1975, and the third (designated as "Amended") on October 6, 1975. In his first charge he claimed that he was being required to "spend an hour to an hour and a half [of] my day relieving the receptionist," despite the fact that this was not "required of the other Employment Counselor who is white." The second charge complained of harassment "because [he] filed a complaint charging unlawful employment practices with EEOC in November of 1973." The final, or "Amended," charge was that the complainant had been "discharged . . . because of [his] race (Negro) and retaliated against because [he] previously filed a charge alleging unlawful employment practices."

attorneys for the plaintiffs who had filed the action originally on behalf of all four plaintiffs and for whom an allowance of attorneys' fees and costs was made. The district judge to whom the Decree was submitted for approval, ordered notice to be given to all interested parties, with opportunity to anyone dissatisfied to object, before determining to approve. Such notice was published in some seventeen newspapers located in all parts of the State, including all the leading dailies. There being no objection filed, the Decree was duly entered on November 10, 1980, after a finding by the Court "that this Decree will further the objectives of Title VII, and should be approved pursuant to Rule 23(e) of the Federal Rules of Civil Procedure." The Court retained "jurisdiction of this matter for the entry of such orders as [might] be necessary." Primarily, this retention of jurisdiction was to resolve the claim of the plaintiff Walter Bailey. Finally, on January 28, 1980, the Court finding that the "personal claims of plaintiff Walter Bailey [had] been resolved among the parties," dismissed the action "with prejudice,"

adding "that this order shall serve as the final adjudication of all issues raised in this action." That order was also agreed to by counsel.

The plaintiff Dalton has now appealed from the final decision in this proceeding "insofar as said order made final and appealable a) the order of May 5, 1978 dismissing original plaintiff Dalton as a named plaintiff and b) the order of May 7, 1980 excluding unsuccessful applicants for employment from the plaintiff class."

The basis for the district court's order dismissing Dalton as a plaintiff in the Title VII action, which is Dalton's first assignment of error, was his failure to file a charge with or to receive a right-to-sue letter from the EEOC. It is the position of Dalton that the filing of a charge with the EEOC is not an essential qualification of a plaintiff under Title VII in a multi-plaintiff action. Concededly any Title VII claim of Dalton, had he filed as the sole plaintiff, would have been properly dismissed for failure to file a charge with the EEOC. There is some confusion in the decisions on the treatment to be accorded his claim if he sues along with other plaintiffs who have

qualified by filing charges with, and receiving a right-to-sue letter from, the EEOC. Some of the decisions hold categorically that such a plaintiff should be dismissed.[4] That was the rule followed by the district court in this case. In other decisions, the standing of a non-charging plaintiff has been upheld if his claim is "substantially identical" with that of another plaintiff who has standing under Title VII to sue.[5] Though the district court did not advert to this more liberal line of cases, it is obvious that Dalton would not have had a right to remain as a party plaintiff under the rationale of such cases since his claim was not "substantially identical" with that of Bailey, the only plaintiff with standing to maintain a Title VII action. Dalton's complaint alleged discrimination in hiring; Bailey's charges were for discriminatory treatment in employment. Dalton's dismissal as a party plaintiff in

---

[4] Inda v. United Air Lines, Inc., 565 F.2d 554, 558-59 (9th Cir. 1977).

[5] Crawford v. United States Steel Corp., 660 F.2d 663, 665-66 (5th Cir. 1981).

the Title VII action was accordingly proper. The conclusion that his dismissal as plaintiff was proper also disposes of Dalton's second claim on appeal (so far as a Title VII action is concerned) that he was improperly denied the right to represent applicants for employment as a class representative.

But Dalton argued that, even if his dismissal as a plaintiff in the Title VII action and the failure to certify him as a class representative were appropriate, the dismissal of his claim under §1981 was erroneous, since the filing of a charge with the EEOC is not a condition to the right to maintain a §1981 action. The position of Dalton on this point is sound. However, he has actually suffered no prejudice by the dismissal of such action. Under the ruling of the disrict court -- not contested by Dalton -- Dalton's remedy in the §1981 action was limited to injunctive relief. The Consent Decree provides complete injunctive relief against "discriminating on the basis of race, sex or national origin in hiring, promotion, upgrading, training, assignment or discharge or otherwise discriminating against an individual employ-

ee with respect to compensation, terms and conditions or privileges of employment because of such individual's race, sex or national origin." That provides as much relief as Dalton could have secured had he continued as a plaintiff in the §1981 action and had been certified as a class representative. Thus any error in dismissing Dalton as a plaintiff in the §1981 action and as a class representative was harmless.

Finally, it would seem that the Consent Decree precludes continued assertion of a claim in this proceeding by Dalton. His counsel consented to the Consent Decree. Moreover, the fullest possible public notice of that Decree was given all interested parties, including the plaintiff Dalton. That Decree was expressly declared to be a final resolution of all issues in the case with a single exception in favor of the claim of the plaintiff Bailey. The Decree should be given proper effect. If it is given such effect, there is no basis for appeal herein.

We accordingly find no merit in the appellant's claim for the reasons assign-

ed and affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARVIN DALTON,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 81-1242
-vs-	)	
	)	
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA et al.,	)	
	)	
Defendants-Appellees.	)	

ORDER
[Filed April 21, 1982]

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Haynsworth, Judge Russell, and Judge Hall.

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

WALTER BAILEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
-vs-	)	
	)	NO. C-75-194-D
EMPLOYMENT SECURITY	)	
COMMISSION OF NORTH	)	
CAROLINA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM
[filed May 5, 1978]

This matter was scheduled for initial pre-trial conference and hearing on all pending motions in the United States Courtroom, Post Office Building, Greensboro, North Carolina, on April 28, 1978. Adam Stein, Esq., appeared as counsel for the Plaintiffs. Thomas S. Whitaker, Esq., appeared as counsel for the Defendants.

This matter is before the Court on plaintiffs' motion for class certification and defendants' motion to join the North Carolina State Personnel Commiss-

ion. Before ruling on these matters, the Court notes that several other matters in the case need attention.

On July 14, 1975, the defendants moved to dismiss this suit on the grounds that it barred by the Eleventh Amendment. On April 21, 1976, the Court stayed further proceedings in this matter pending the resolution of an Eleventh Amendment case in the United States Court of Appeals for the Fourth Circuit. Subsequently the Supreme Court issued its opinion in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and this Court removed its stay order in this case without ruling on the defendants' Eleventh Amendment motion. It is now clear that back pay or lost wages can be recovered under 42 U.S.C. Sec. 2000e. Fitzpatrick v. Bitzer, supra. It is equally clear that such relief is not available under 42 U.S.C. Sec. 1981 or Sec.1983. Trotman v. Palisades Interstate Park Commission, 557 F.2d 35 (2d Cir. 1977); Wade v. Mississippi Co-op Extension Service, 528 F.2d 508 (5th Cir. 1976). Prospective injunctive relief under any of the above statutes, however, would not be barred. Edelman v. Jordan, 415 U.S. 651 (1974). Therefore, the de-

fendants' motion to dismiss as it applies to lost wages under 42 U.S.C. Sec. 2000e and prospective injunctive relief is denied; the motion is granted as it applies to lost wages under 42 U.S.C. Sec. 1981 and Sec. 1983.

On August 1, 1977, this Court, in denying defendants' motion to dismiss for failure to join the U.S. Secretary of Labor, ordered the Clerk of the Court to forward the appropriate documentation to the Secretary. The Secretary was to determine if he wished to intervene. The Secretary has responded indicating that he has no responsibility for the internal personnel operations of the defendant Employment Security Commission. Since the Secretary has no desire to intervene, the Court considers that aspect of the case closed.

The plaintiffs have moved for class certification desiring to certify a class of females and a class of blacks who have been in the past, are presently being, and will be in the future discriminated against by the defendants in hiring, promotion, transfers, and discharge. Essentially, the plaintiffs charge "across the board" discrimination. Such a class has

been recognized in this circuit. See Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975), which cited with approval the leading case in this area of the law. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). However, the Court does not feel that the classes can be as broad as plaintiffs seek. Specifically, the court feels that persons who are barred from bringing an action in their own right when the putative class representative files his EEOC complaint cannot be included in the class represented by that that class representative. To allow otherwise would mean that persons could recover as class members when they could not recover in an individual action. Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3d Cir. 1975), vacated on other grounds, 424 U.S. 737 (1976); Freeman v. Motor Convoy, Inc., 409 F.Supp. 1100 (N.D.Ga. 1976).

See United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977), where the Supreme Court said, "a discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the stat-

ute was passed . . . it is merely an unfortunate event in history which has no legal consequences."

Thus the class to be represented by Bailey shall be tentatively and conditionally defined as "all black persons who have been employed or denied employment since May 17, 1973, who are now employed, or who may in the future be employed by the Employment Security Commission of North Carolina." May 17, 1973, is, of course, 180 days prior to the date plaintiff Bailey filed his complaint with EEOC on November 13, 1973.

While plaintiff McLean has filed a grievance with EEOC, she has not received a right to sue letter. She is therefore subject to dismissal at this time, and the Court does dismiss her as a named plaintiff. Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258 (4th Cir. 1972). She can, of course, be a member of the class represented by Bailey if she so qualifies. Counsel for the plaintiffs concede that McLean is not a representative of the class of females being sought and that such request for relief is abandoned.

Having tentatively and conditionally defined the class to be represented by plaintiff Bailey and dismissing McLean as a named plaintiff, the Court now turns to plaintiffs Dalton and Hubbard. Neither alleged in the complaint that he had either received a right to sue letter or that he even filed a complaint with the EEOC. These men are properly subject to dismissal as named plaintifs and are so dismissed for failure to meet the jurisdictional prerequisites necessary to bring an action under Title VII. Electrical Workers v. Robbins & Myers, 429 U.S. 229 (1976); McDonnell Douglas Corp v., Green, 411 U.S. 792 (1973); Tippett v. Liggett & Myers Tobacco Co., 402 F.Supp. 934 (M.D.N.C. 1975). Dalton and Hubbard can, of course, be members of the class represnted by Bailey if they so qualify.

On the final matter the defendants have moved pursuant to Rule 19, Federal Rules of Civil Procedure, to join the North Carolina Personnel Commission on the grounds that the Employment Security commission's personnel practices are controlled by the State Personnel Commission. Since the plaintiffs have not dis-

puted the affidavits presented by the defendants, the defendants' motion is granted. The North Carolina State Personnel Commission is ordered joined as a defendant.

The defendant Employment Security Commission, et al., will file its answer within thirty days from the date of this memorandum.

I, Cathy H. Nieman, Official Reporter, do hereby certify that the foregoing is a true transcript from my notes of the entries made in the above entitled cause before and by JUDGE HIRAM H. WARD; and I do further certify that a copy of this transcript was mailed to each of the below named attorneys on May 5, 1978.

Given under my hand this 5th day of May, 1978.

/s/ Cathy H. Nieman
United States
Court Reporter

cc: Adam Stein, Esq.
Thomas S. Whitaker, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

WALTER BAILEY, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL ACTION
-vs-	)	
	)	NO. C-75-194-D
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM
[filed March 7, 1980]

This matter was scheduled for final pre-trial conference in the Unitd States Courtroom, Post Office Building, Durham, North Carolina, February 27, 1980. Adam Stein, Esq., and Kenneth N. Flaxman, Esq., appeared as counsel for the plaintiffs. Ms. Norma S. Harrell, Attorney, Thomas S. Whitaker, Esq., and Garland D. Crenshaw, Esq., appeared as counsel for the defendants.

The class is redefined conditionally as all black employees of the Employment Security Commission of North Carolina who have, since May 17, 1973, been discrimi-

nated against by the defendants in promotions, transfers, and discharges because of their race.

The proposed final pre-trial order submitted by counsel for the parties is approved in the form submitted as the same may be applicable to the class as just conditionally redefined above.

The case will be calendared for a non-jury term. After the calendar has been prepared, and at least fifteen days prior to the scheduled trial date, counsel for the parties shall file with the court their respective trial briefs, together with their proposed findings of facts and conclusions of law, with citations of authority for each proposd conclusion.

The defendants' motions for summary judgment filed today will be further considered at the trial of this action at the close of the plaintiff's evidence if defendants feel advised to make a Rule 50 motion. Plaintiffs need not respond to the motion for summary judgment.

I, Chester L. Hollifield, Official Reporter, do hereby certify that the foregoing is a true transcript from my

notes of the entries made in the above entitled cause before and by JUDGE HIRAM H. WARD; and I do hereby further certify that a copy of this transcript was mailed to each of the below-named attorneys on March 7, 1980.

Given under my hand this 7th day of March, 1980.

/s/ Chester L. Hollifield
United States Court Reporter

cc: Adam Stein, Esq.
Ms. Norma S. Harrell, Attorney
Thomas S. Whitaker, Esq.

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

[Title Omitted]

ORDER

Upon consideration of the Pre-Trial Order in this case, and following a conference with counsel, it appears to the Court that the conditional class definition in this case is overbroad. Accordingly, pursuant to Rule 23(C)(1) of the Federal Rules of Civil Procedure,

IT IS ORDERED that the class in this case be, and the same is, redefined as follows:

> All black persons employed by the Employment Security Commisssion of North Carolina on or after May 17, 1973 who were denied promotions, or who were deterred from applying for promotions, because of the promotional testing program used by the Employment Security Commission prior to November, 1975.

Dated: August 14, 1980.

/s/ Robert E. Merhige, Jr.
United States District Judge

APP. 1

(PLEASE PRINT OR TYPE) (Amended)

CHARGE OF DISCRIMINATION	FILE NUMBER NO. TCT4-0493	AGENCY CODE NO. 124-80001

INSTRUCTIONS: If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In many states, a charge must be filed with the EEOC within a specified time after the discrimination(s) took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

CAUSE OF DISCRIMINATION: [ ] RACE OR COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN

Velma Lee Bailey	DATE OF BIRTH: February 1, 1949
311 South LaSalle Street, Durham	TELEPHONE NO.: 246-74-9087
Durham, North Carolina 27705	TELEPHONE NO. (Include area code): 919-286-1124
THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME	
Mrs. Delgeatha Bailey	TELEPHONE NO. (Include area code): 919-591-7264
P. O. Box 73	CITY, STATE, AND ZIP CODE: Walnut Cove, North Carolina 27052

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (If more than one, list all)

N.C. Employment Security Commission	TELEPHONE NO. (Include area code): 919-688-8071
200 West Jones Street	CITY, STATE, AND ZIP CODE: Raleigh, North Carolina 27603

NUMBER OF EMPLOYEES, MEMBERS: over 15 employees	DATE(S) DISCRIMINATION TOOK PLACE: Earliest: Feb. 28 1973 and continuing

Explain what actually took place to you and how other persons were treated differently. Use additional paper if necessary.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Walter Bailey

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, year): 7/29/74

SIGNATURE AND TITLE OF AUTHORIZED EEOC REPRESENTATIVE: James M. Bordeaux

NOTARY PUBLIC

SIGNATURE OF NOTARY PUBLIC

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Month, day, year)

EEOC Form No. 5 — Previous editions of this form may be used. — U.S. GOVERNMENT PRINTING OFFICE: 1972 O 484-546/1283 3-71 5